(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
J.V. Peters and Company, a Partnership, David B. Shillman, and Dorothy L. Brueggemeyer	)	RCRA (3008) Appeal No. 95-2
Docket No. V-W-81-R-75	)	

[Decided April 14, 1997]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

J.V. PETERS AND COMPANY, ET AL.

RCRA (3008) Appeal No. 95-2

FINAL DECISION AND ORDER

Decided April 14, 1997

Syllabus

J.V. Peters and Company, a partnership, David B. Shillman, and Dorothy L. Brueggemeyer (collectively, "Respondents") have appealed an initial decision by Administrative Law Judge Gerald Harwood (the "Presiding Officer") assessing a civil penalty against them jointly and severally in the amount of $23,500 for numerous violations of section 3004 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6924. The violations were observed during inspections of Respondents' Middlefield Township, Ohio hazardous waste storage and reclamation facility ("the facility") in December 1980. Respondents' present appeal is the third in the Region's efforts to impose liability on Respondents for the numerous violations noted during the inspections of the facility seventeen years ago.

In 1981, the Region began administrative enforcement proceedings involving the facility by filing a complaint against J.V. Peters & Company, Inc., (the "Corporation"), a corporation which assumed all of the assets and liabilities of respondent J.V. Peters and Company ("the Partnership") shortly after the Region's 1980 inspections were completed. At an evidentiary hearing held in October 1984, the Region offered the testimony of two witnesses -- the EPA inspector and an environmental scientist -- to substantiate the violations alleged and the penalty proposed in its complaint against the Corporation.

The Corporation's defense rested entirely upon the testimony of its president, respondent Shillman. In testimony covering the Region's inspections of the facility, the formation of and relationship between the Partnership and the Corporation, and his role as manager of the facility, Mr. Shillman admitted that the facility was in violation of certain statutory requirements. Mr. Shillman also identified himself, the Partnership, and its partners as persons or entities who owned or controlled the facility at the time of the inspections, and in doing so provided evidence inculpating these persons and entities.

In May 1985, Administrative Law Judge Marvin Jones ("the ALJ") issued an initial decision, finding the Corporation, the Partnership and Mr. Shillman jointly and severally liable for the violations alleged in the complaint, and assessing against them a $25,000 penalty therefor. The Corporation appealed the decision to the EPA's Chief Judicial Officer ("CJO"), who held that the ALJ had erred in finding the Partnership and Shillman liable, since they were not parties to the complaint. The CJO therefore remanded the case to allow the Region to amend its complaint and to allow Mr. Shillman and the Partnership to prepare and present their defenses.

In November 1987, the Region filed its Second Amended Complaint, naming the Respondents, the Corporation, and Mr. John Vasi, a partner in the Partnership. With the exception of Mr. Vasi, who defaulted, all of the respondents filed answers denying liability and raising as an affirmative defense the five-year statute of limitations contained in 28 U.S.C. § 2462. In September 1988, relying upon the record established at the 1984 hearing and Respondents' answers to the Second Amended Complaint, the ALJ issued a second initial decision, in which he rejected the statute of limitations defense and found Respondents and Mr. Vasi jointly and severally liable for the $25,000 penalty previously assessed. The ALJ found that the Corporation was not liable for any of the violations, since it did not exist at the time of those violations.

Respondents then appealed to the CJO, who issued a final decision in August 1990 affirming the ALJ's September 1988 initial decision. The CJO held that the statute of limitations defense was without merit since the Second Amended Complaint related back to an earlier complaint which was timely filed. He also held that an accelerated decision was warranted because Respondents failed to show that they were entitled to a hearing, to demonstrate any disputed issues of material fact, or to show that the Region was not entitled to judgment as a matter of law.

Respondents then appealed to the U.S. Court of Appeals for the Sixth Circuit, which transferred the case to the U.S. District Court for the Northern District of Ohio, Eastern Division. In an unpublished decision issued in August 1991, the District Court affirmed the CJO's decision on the statute of limitations issue, but found that the CJO had erred in affirming the ALJ's denial of a hearing to Respondents. Accordingly, the case was remanded for the second time, with specific instructions from the District Court requiring that an evidentiary hearing be conducted "wherein * * * David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters and Company are given an opportunity to present evidence to contest their liability for the $25,000 civil fine assessed against them * * *."

In September 1993, after the case had returned to the EPA, Presiding Officer Gerald Harwood issued a letter to the parties announcing that he would conduct the evidentiary hearing by permitting the Region to utilize the transcribed testimony of its witnesses from the 1984 hearing, in lieu of presenting those witnesses for oral direct testimony. The Presiding Officer stated that he would then require the Region to tender those witnesses to Respondents for cross-examination. Although Respondents had objected to this procedure when it was first proposed by the Region in its pre-hearing exchange, they did not object to the format as established by the Presiding Officer.

The evidentiary hearing, held in October 1994, began with a heated debate between counsel as to how the hearing should proceed. Respondents insisted that due process required that the Region present its case anew with live witness testimony. The Region protested that the hearing should proceed as established by the Presiding Officer. Ultimately, the Presiding Officer ordered the parties to follow the procedure established in his September 1993 letter. He granted Respondents the right to conduct "wide open" cross-examination and to offer whatever evidence they desired in their defense. He also assured Respondents that he would review the entire record from the 1984 hearing *de novo*.

At the hearing, the Region's inspector offered brief testimony reaffirming her 1984 testimony. Respondents refused to cross-examine her, claiming that the Region had not put on any evidence and Respondents therefore were not obligated to present any defense. Respondents also stated they would have no cross-examination for the Region's environmental scientist. When the Region then attempted to call Mr. Shillman for the sole purpose of reaffirming his 1984 testimony, Respondents refused to produce him, claiming that since the Region had offered no evidence they were not obligated to offer any defense, which included making their witnesses available to the Region. Having offered into evidence the transcript of the 1984 hearing, including the documents admitted as exhibits, the Region rested its case. Despite being given the opportunity to present a full-fledged defense, Respondents offered no witnesses or evidence in their behalf.

In July 1995, the Presiding Officer issued his initial decision finding the Partnership, Mr. Shillman and Ms. Brueggemeyer jointly and severally liable for the violations alleged. Making a minor reduction in the penalty to account for his dismissal of one of the violations, the Presiding Officer assessed a civil penalty of $23,500 against all Respondents. In his initial decision, the Presiding Officer rejected Respondents' claims that they had been denied due process in the 1994 hearing, noting that he had satisfied the District Court's remand order by giving them opportunities to

cross-examine the Region's witnesses and to present evidence in their defense. The Presiding Officer let stand his earlier ruling rejecting Respondents' statute of limitations defense.

Respondents' present appeal is taken from the July 1995 initial decision, and raises the following issues: (1) whether the complaint is barred by the five-year statute of limitations contained in 28 U.S.C. § 2462; (2) whether the Presiding Officer erred by permitting the Region at the 1994 hearing to establish its *prima facie* case utilizing evidence from the 1984 hearing; and (3) whether Respondents are liable for the penalty assessed against them.

Held: The District Court's ruling that the complaint is not barred by the statute of limitations is the law of the case, thus precluding further review of that issue by the Board.

The Presiding Officer did not err in permitting the Region to utilize evidence from the 1984 hearing to establish its *prima facie* case against Respondents at the 1994 hearing. The format of the hearing was consistent with the requirements of the District Court's remand order, and Respondents were not deprived of due process of law. The Presiding Officer has broad discretion to control the order and format of administrative hearings under the Consolidated Rules of Practice, and those rules specifically permit the use of written statements in lieu of oral testimony. In addition, Respondents were given ample notice of the format which would be followed at the 1994 hearing, and had been provided well in advance of the hearing the transcript page citations of the testimony that the Region planned to introduce. Respondents were afforded the opportunity to conduct "wide open" cross-examination of the Region's witnesses. Respondents' refusal to take advantage of these opportunities cannot be assigned as error on the part of the Presiding Officer.

Further, the witness testimony and other evidence from the 1984 hearing was properly introduced against Respondents at the 1994 hearing, as all such evidence was relevant, probative and reliable, which is the standard for admission of evidence under the Consolidated Rules. None of Respondents' specific contentions as to why this evidence was inadmissible has any validity.

The findings of liability and the penalty assessed against Respondents are affirmed, since Respondents fail to address the substance of the findings of liability and the amount of the penalty in their appeal.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.[1]

Opinion of the Board by Judge Reich:

J.V. Peters and Company, a partnership, David B. Shillman, and Dorothy L. Brueggemeyer (hereafter referred to collectively as "Respondents")[2] have appealed an initial decision issued on July 18, 1995, assessing against them jointly and severally a $23,500 penalty for numerous violations of section 3004 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6924, which were observed during an inspection that took place in December 1980. The issues raised on appeal are: (1) whether the complaint is barred by the five-year statute of limitations contained in 28 U.S.C. § 2462; (2) whether the presiding officer erred by permitting U.S. EPA Region V to establish its *prima facie* case against Respondents by utilizing evidence from a prior hearing;[3] and (3) whether Respondents are liable

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[1]Environmental Appeals Judge Kathie A. Stein did not participate in this decision.

[2]Throughout their brief, Respondents refer to themselves as "Petitioners." Where the term "Petitioners" or "Appellants" appears in material quoted from the parties' briefs or other documents from these administrative proceedings, we have substituted the term "Respondents." Our substitutions are earmarked by brackets (i.e. [Respondents]) so as to eliminate confusion.

[3]Respondents present for appellate review two issues attacking the propriety of the use of evidence from the 1984 hearing against them at the hearing in 1994. [Respondents'] Appellate Brief ("Resp. Br.") at 2, issues 4 and 5. Issues 4 and 5 interrelate and overlap, making separate review and discussion of them difficult. Thus, for purposes of identifying the issues on appeal, we have consolidated issues 4 and 5 into a single issue relating to the use of evidence from the 1984 hearing. Although our discussion does not precisely track the issues as they are articulated in Respondents' brief, we believe our approach promotes clarity and (continued...)

for the penalty assessed against them. For the reasons set forth below, we affirm the initial decision.

I. *BACKGROUND*

This is the third time this case has reached the level of an administrative appeal.[4] A summary of the history of the case is required in order to understand fully the claims raised in this appeal.

A. *Initial Proceedings Against the Corporation (1980-1984)*

In May 1980 respondent David B. Shillman leased property located at 17030 Peters Road in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility began operations one month later in June 1980, under the name "J.V. Peters and Company," (the "Partnership"), a partnership whose partners were Dorothy Brueggemeyer (Mr. Shillman's wife), and John Vasi, an acquaintance of Mr. Shillman's. Mr. Shillman was the manager of the facility and maintained complete control over its operations. *See* 1984 Hearing Transcript ("1984 Tr.") at 432.

In December 1980, Melinda Becker, an employee of the Ohio Environmental Protection Agency, inspected the Partnership's hazardous waste facility in Middlefield

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[3](...continued)
addresses all of Respondents' contentions on appeal.

[4]The first two appeals were decided by the Agency's Chief Judicial Officer. As of March 1, 1992, the authority to decide appeals from initial decisions was delegated to the Environmental Appeals Board. *See* 57 Fed. Reg. 5324-5326 (Feb. 13, 1992) (revising Part 22 to reflect role of new Environmental Appeals Board).

Township[5]. Ms. Becker identified eighteen alleged violations of RCRA and its implementing regulations.[6] Soon thereafter,

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[5]Although she was an employee of the Ohio EPA, Ms. Becker's inspection was conducted on behalf of the United States Environmental Protection Agency pursuant to a cooperative agreement between those two agencies. 1984 Tr. at 35.

Ms. Becker began her inspection on December 8, 1980, but was unable to complete it that day because Mr. Shillman was unavailable and much of the information she sought was inaccessible. She therefore returned to the site on December 17, 1980 and completed the inspection on that day. 1984 Tr. at 50-51; Complainant's Exhibit ("C Ex") 1 at 2 (RCRA Inspection Report).

[6]Since it began operation before November 19, 1980, the Partnership was subject to the "Interim Status Standards." *See* RCRA § 3005(e), 42 U.S.C. § 6925(e). Essentially, this provision permits a facility to operate while its permit application is being reviewed by the EPA, so long as the facility satisfies certain specified requirements. *Id*. These requirements are the "Interim Status Standards" which are set forth in 40 C.F.R. part 265.

During her inspection Ms. Becker noted the following violations of 40 C.F.R. Part 265:

-failure to obtain a detailed chemical and physical analysis of waste handled at the facility;
-failure to develop and follow a written waste analysis plan;
-failure to secure the perimeter of the facility;
-failure to post "keep out" signs;
-failure to maintain a written inspection schedule and log;
-failure to maintain written job descriptions and training records;
-failure to install an emergency alarm or communication system;
-failure to maintain adequate emergency equipment;
-failure to maintain an adequate sprinkler system or its equivalent;
-failure to maintain adequate aisle space;
-failure to make arrangements with state and local

(continued...)

she sent a copy of her inspection report to the Partnership. On January 30, 1981, two weeks after receiving the inspection report, J.V. Peters and Company, Inc., an Ohio corporation (the "Corporation") was formed and the Partnership transferred all of its assets and liabilities to the Corporation. Mr. Shillman served as the Corporation's president and chairman of the board of directors. Ms. Brueggemeyer, one of the Corporation's stockholders, was the secretary and treasurer of the Corporation, and one of its directors. The business of the Corporation was identical to that of the Partnership.[7]

On April 17, 1981, U.S. EPA Region V ("the Region") filed a complaint based upon the December 1980 inspections, naming only the Corporation as a respondent. On February 7, 1984, the Region filed an amended complaint, again naming only the Corporation as a respondent.

B. *1984 Evidentiary Hearing*

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[6](...continued)
emergency response authorities;
-failure to maintain a contingency plan;
-failure to maintain a written operating record;
-failure to make required records available to U.S. EPA representatives upon reasonable request;
-failure to maintain hazardous waste containers in a closed condition;
-failure to keep flammable waste more than 50 feet from the property line; and
-failure to have a closure plan.

See In re J.V. Peters & Company, Inc., 2 E.A.D. 177, 178 n.4 (CJO 1986).

[7]The facts relating to the formation of the Partnership and Corporation are taken from the following sources: (1)Mr. Shillman's, Ms. Brueggemeyer's, the Partnership's, and the Corporation's Answers to the Second Amended Complaint, dated November 30, 1987; and (2) 1984 Tr. at 430-433; 549-559.

In October 1984, a three-day hearing on the complaint was held before Administrative Law Judge Marvin Jones.[8] Three witnesses appeared and testified: Ms. Becker, the inspector; Dr. Homer, an environmental scientist employed in the Region's Waste Management Division; and Mr. Shillman, president of the Corporation and manager of its hazardous waste storage facility.

Ms. Becker's testimony focused on the violations alleged in the complaint. She testified at length about the site conditions she observed and conversations she had with Mr. Shillman during the inspection. She also testified about some of her previous and subsequent inspections of the site. Counsel for the Corporation vigorously cross-examined Ms. Becker, covering topics such as the motive for the inspection, whether the alleged violations actually occurred, and whether the Corporation promptly remedied or attempted to remedy the alleged violations. This cross-examination (and re-cross-examination) consumed 174 pages of the hearing transcript.

Dr. Homer, the Region's next and last witness, gave testimony to establish the appropriate penalty amount for the alleged violations. He testified that he had participated in drafting the 1984 amended complaint and in calculating the $25,000 penalty proposed therein. His testimony explained how he calculated a penalty amount for each of the alleged violations based upon Ms. Becker's inspection report and the

[8]Administrative Law Judge Jones was the presiding officer in these administrative proceedings from 1984 to 1991. After the case was remanded for the second time in 1991, a new presiding officer, Administrative Law Judge Harwood, was assigned. To prevent confusion we shall refer to ALJ Jones by name and reserve the term "Presiding Officer" to refer to ALJ Harwood.

applicable penalty policy.[9] Dr. Homer was also vigorously cross-examined by counsel for the Corporation.

At the conclusion of Dr. Homer's testimony, the Corporation moved to dismiss the complaint on the ground that the Corporation did not exist on December 17, 1980, the date of the alleged violations. The motion was denied.[10] The Corporation then put on its sole witness, Mr. Shillman. Mr. Shillman testified at length about the December 1980 inspections and his numerous contacts with both the State and federal environmental agencies. His testimony also covered the steps the Corporation took to comply with the Interim Status Standards, the financial status of the Corporation at the time of the hearing, and the formation of and relationship between the Partnership and the Corporation.

On the latter topic, Mr. Shillman explained that he had organized the Partnership in 1980 to enter the industrial waste handling business. The Partnership was comprised of two partners: John Vasi and Mr. Shillman's wife, Dorothy L. Brueggemeyer. The Partnership's operations were funded by a single $25,000 contribution from Ms. Brueggemeyer, which was the sole capital investment in the business. According to Mr. Shillman, the Partnership transferred all of its assets and liabilities to the Corporation, which was created on

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[9]*See* A Framework for Development of a Penalty Policy for Resource Conservation and Recovery Act (RCRA) (December 31, 1980) ("1980 RCRA Penalty Policy") and Guidance on Developing Compliance Orders Under Section 3008 of Resource Conservation and Recovery Act (July 7, 1981) ("1981 Guidance Memo").

[10]In responding to the Corporation's motion, ALJ Jones remarked: "I'm not going to dismiss the case, but if you want to argue the point about the partnership and the corporation, you can." 1984 Tr. at 418. He went on to invite the Corporation to address in its post-hearing brief the issue of whether the corporate veil could or should be pierced. *Id*.

January 30, 1981. Mr. Shillman affirmed that the business of the Corporation was the same as the business of the Partnership.

Mr. Shillman admitted that the facility was in violation of certain statutory requirements. He also identified himself, the Partnership and its partners as the persons or entities who owned and controlled the facility at the time of the inspection, and thus provided evidence inculpating these persons and entities. 1984 Tr. at 432-433, 436, 482, 497, 549-551, 588-590.

After the hearing concluded but before ALJ Jones issued a decision, the Region moved to amend its complaint to name Mr. Shillman and the Partnership as respondents. ALJ Jones did not rule on this motion. Instead, in May 1985, he issued his initial decision, finding the Corporation, the Partnership and Mr. Shillman jointly and severally liable for the violations alleged in the complaint and assessing a $25,000 civil penalty therefor.

The Corporation appealed the initial decision and it was vacated by the Agency's Chief Judicial Officer ("CJO"). The CJO concluded that because the Partnership and Mr. Shillman had not been named as respondents, ALJ Jones had erred in finding them liable. According to the CJO, the Partnership and Mr. Shillman should have been given "an opportunity to present evidence at the hearing to contest responsibility for the violations." *In re J.V. Peters & Company, Inc.*, 2 E.A.D. 177, 183 (CJO 1986). Therefore, the CJO remanded the case to allow the Region to amend its complaint, and to allow Mr. Shillman and the Partnership to prepare and present their defenses.

C. *Proceedings After Remand by CJO (1987-1991)*

The Region filed its Second Amended Complaint in November 1987, naming as respondents the Corporation, the

Partnership, Mr. Shillman, Ms. Brueggemeyer and Mr. Vasi. With the exception of Mr. Vasi[11] all Respondents filed answers denying the alleged violations and raising as an affirmative defense the five-year statute of limitations in 28 U.S.C. § 2462.[12]

The Region moved for an accelerated decision on the Second Amended Complaint pursuant to 40 C.F.R. § 22.20, which provides that a presiding officer may render a decision without a hearing if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. In support of its motion the Region relied upon the testimony and documentary evidence produced at the 1984 hearing, and upon Respondents' answers to the Second Amended Complaint.

In September 1988, ALJ Jones granted the Region's motion for an accelerated decision. He concluded that the remand order did not disturb his previous findings that violations warranting a $25,000 penalty had occurred, and thus he was only required to decide who was responsible for that penalty. Relying upon the record established at the 1984 hearing and Respondents' answers to the Second Amended Complaint, ALJ Jones found Mr. Shillman liable as the "operator" of the facility, and partners Ms. Brueggemeyer

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[11]Mr. Vasi defaulted, thus admitting all of the allegations in the Second Amended Complaint. *See* 40 C.F.R. § 22.17(a) ("Default by Respondent constitutes * * * an admission of all facts alleged in the complaint * * *.").

[12]Section 2462 of Title 28 of the United States Code provides in pertinent part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture * * * shall not be entertained unless commenced within five years from the date when the claim first accrued * * *.

and Mr. Vasi liable as "owners" of the facility, and he therefore assessed the $25,000 penalty jointly and severally against Mr. Shillman, Mr. Vasi, Ms. Brueggemeyer and the Partnership.[13] He rejected Respondents' statute of limitations defense.

For the second time, Respondents appealed to the Agency's CJO, who this time affirmed ALJ Jones' initial decision.[14] *See In re J.V. Peters & Company, Inc.*, 3 E.A.D. 280 (CJO 1990). The CJO concluded that the statute of limitations defense was without merit. Assuming for purposes of discussion that the statute applied (a point contested by the Agency), he concluded that the action would not be barred in any event because the Second Amended Complaint related back to the previous complaint, which was filed within the limitations period. *Id*. at 285-290. The CJO also concluded that an accelerated decision was warranted because Respondents failed to show that they were entitled to a hearing (even though the rules governing the accelerated decision process gave them the opportunity to do so), and because they failed to demonstrate any disputed issues of material fact or show that the Region was not entitled to judgment as a matter of law. *Id*. at 291-296.

Respondents then appealed to the United States Court of Appeals for the Sixth Circuit, which transferred the case to the United States District Court for the Northern District of Ohio, Eastern Division ("District Court"). In an unpublished decision issued on August 13, 1991, the District Court

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[13]ALJ Jones found that the Corporation was not liable for any of the alleged violations because it did not exist at the time of the violations.

[14]John Vasi did not appeal so the initial decision became final as to him. *See* 40 C.F.R. § 22.27(c) (initial decision becomes final within 45 days after service unless a party appeals the matter or Board exercises *sua sponte* review).

upheld the CJO's decision on the statute of limitations issue, adopting the CJO's rationale that the statute did not bar the claims made in the Second Amended Complaint because those claims related back to the previous complaint, which was timely filed. *See J.V. Peters v. Reilly*, No. 1:90 CV 2246, slip op. at 12-13 (N.D. Ohio Aug. 13, 1991). However, the District Court found that the CJO had erred in affirming ALJ Jones' denial of a hearing to Respondents. *Id*. at 13. Relying on the specific wording of the RCRA statute upon which the Region's allegations were based, the District Court held that Respondents were entitled to a public hearing as a matter of law. *Id*. at 14-15.[15] Accordingly, the case was remanded for

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[15]Reviewing the terms of RCRA § 3008(b), which provides that an order becomes final unless a person requests a public hearing, the District Court held:

> Under the statute, it is stated that the Administrator, and by delegation * * * the ALJ, shall conduct a public hearing upon respondents' request. The statute does not allow the ALJ discretion to deny the hearing for any reason, not even if he believes there are no factual issues to resolve.

J.V. Peters v. Reilly, slip op. at 14.

We do not believe that this is an accurate statement of the law, as this Board has held that the accelerated hearing procedure criticized by the District Court is properly utilized precisely in the situation where there are no factual issues in dispute. *See In re Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, slip op. at 14-16 (EAB March 6, 1997), 6 E.A.D. ___(principle that party waives its right to adjudicatory hearing by failing to raise disputed material facts was cited with approval by Supreme Court in *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 214 n. 12 (1980)). Further, we have recognized that a "hearing" may consist solely of documentary submissions in appropriate cases. S*ee, e.g., In re General Electric Company*, 4 E.A.D. 615, 627 (EAB 1993) (documentary submissions are all that is necessary to satisfy due process requirement for "hearing" in highly technical matters). However, our disagreement with the District Court on this matter is immaterial since, in this case, Respondents *did* receive the "hearing" mandated by the District Court.

the *second* time, this time with instructions from the District Court to:

> [C]onduct an evidentiary hearing wherein * * * David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters and Company [the Partnership] are given an opportunity *to present evidence to contest their liability for the $25,000 civil fine assessed against them* in the United States Environmental Protection Agency's Second Amended Complaint.

J.V. Peters v. Reilly, No. 1:90 CV 2246 (N.D. Ohio Aug. 13, 1991) (Order) (hereafter "Remand Order") (emphasis added).

D. *Proceedings Following Remand by District Court (1992-1994)*

Shortly after the case returned to the Agency, the parties submitted pre-hearing exchanges to a newly assigned presiding officer, Senior Administrative Law Judge Gerald Harwood (the "Presiding Officer"). In its pre-hearing exchange, the Region stated that it intended to rely on the record from the 1984 hearing and to produce additional evidence only to the extent necessary to put on a rebuttal case.

Respondents filed separate but virtually identical submissions, asserting that: (1) they were not liable for any civil penalty since they were not parties in the prior action and had not been given an opportunity to defend themselves against the charges; (2) they did not commit any of the alleged violations; (3) even if they had, the penalty was unwarranted; and (4) the complaint was barred by the

statute of limitations and should therefore be dismissed.[16] Each Respondent stated its intent to present evidence only after the Region first presented a *prima facie* case establishing the liability of that Respondent. Respondents uniformly objected to the Region's plan to rely on the record from the 1984 hearing, claiming they had no opportunity to cross-examine witnesses or challenge documents at that time.

Having noted that objection, Respondents indicated they would proceed at the hearing by cross-examining Ms. Becker and then calling Mr. Shillman, Ms. Brueggemeyer, and Mr. Angelo Colon (a vice-president of the Corporation), as witnesses in their behalf. Many of the documents Respondents indicated they would introduce at the hearing were the same ones that had been introduced and relied upon by the Corporation in 1984.

Based upon these submissions, the Presiding Officer scheduled a four-day hearing for November 1993 in Cleveland, Ohio. In correspondence to the parties informing them of the hearing date, the Presiding Officer established the format to be followed at that hearing:

> The EPA in lieu of presenting its witnesses for oral direct testimony may offer, instead, their transcribed direct testimony from the previous

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[16]These submissions were filed pursuant to an order by the Presiding Officer, since Respondents failed to meet the deadline for pre-hearing exchanges. The submissions were identical in all respects except the following: Mr. Shillman's submission denied that he was a partner in the Partnership and Ms. Brueggemeyer's submission denied that she controlled the affairs of the Partnership on the date of the alleged violations. Respondents' submissions were all prepared and submitted by the same attorney who had represented the Corporation at the 1984 hearing.

> hearing. The witnesses shall be made available, however, for cross examination. * * *.
>
> Mr. English will review the testimony of the EPA's witnesses from the prior hearing and notify the EPA attorney prior to the hearing which of the EPA's witnesses he intends to cross examine at the hearing.

Letter from Gerald Harwood, Senior Administrative Law Judge, to Brent L. English, Counsel for Respondents, and Thomas J. Krueger, Counsel for Region V (Sept. 9, 1993) ("Harwood letter").

On September 16, 1993, the Region filed a supplemental pre-hearing exchange which, among other things, reaffirmed its intent to rely upon the evidence produced at the 1984 hearing, and in particular, the testimony of Ms. Becker and Mr. Shillman.[17] Respondents filed no supplemental pre-hearing exchange and did not express any objections to the hearing format established in the Harwood letter.

The four-day hearing originally scheduled for November 1993 was postponed and rescheduled several times. On January 31, 1994, in preparation for the hearing then scheduled to go forward in February, the Region provided to Respondents and the Presiding Officer a list identifying the testimony and documents it intended to rely upon at the hearing, along with page citations corresponding to the 1984 transcript. Letter from Thomas J. Krueger, Assistant Regional Counsel, to Gerald Harwood, Senior Administrative Law Judge (January 31, 1994) ("Krueger

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[17]In this supplemental pre-hearing exchange the Region also identified those portions of the testimony which it contended established Respondents' liability, and stated that it would make Ms. Becker and Dr. Homer available at the hearing for cross-examination.

letter").[18] Approximately one week before the actual hearing commenced, the Presiding Officer issued an order rejecting the statute of limitations defense raised in Respondents' answers to the complaint.[19]

E. *1994 Evidentiary Hearing*

On October 3, 1994, the parties convened in Cleveland, Ohio for the four-day hearing. However, the hearing lasted only a single day, most of which was spent in arguments about how the hearing should proceed. Although the Presiding Officer had established the hearing format in September 1993 *and Respondents had lodged no objections thereto in the ensuing thirteen months*,[20] they now insisted

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[18]On March 18, 1994, the Region filed a motion to amend its complaint to reflect that some of the violations extended beyond December 17, 1980. The motion was granted on April 19, 1994, and Respondents were ordered to file answers to the "Third Amended Complaint." Respondents' answers raised, among other issues, the statute of limitations defense. Later, Respondents moved to dismiss the Third Amended Complaint on the ground that it was time-barred. On August 24, 1994, the Region filed a motion to withdraw its Third Amended Complaint and to reinstate the Second Amended Complaint as the operative complaint in these proceedings. This motion was granted on September 26, 1994.

[19]*See* Order (Sept. 26, 1994). This order denies Respondents' "motion to dismiss and for an accelerated decision" (*id*. at 5), which actually challenged the *Third* Amended Complaint. Since that complaint had been withdrawn, the Presiding Officer reviewed Respondents' motion as though it was addressed to the Second Amended Complaint.

[20]We are aware that Respondents had lodged an objection *before* the Presiding Officer established the hearing format. However, they expressed no objection to the format once it was established. Moreover, when they made their earlier objection, Respondents indicated that they would nonetheless proceed with the hearing, and went on to identify the witnesses and documents they planned to introduce to establish their (continued...)

that due process required the Region to present its case anew with live witness testimony on direct. Further, Respondents stated that until the Region did so, Respondents were not obligated, and indeed, did not intend, to present any defense. The Region protested that the hearing should proceed as established by the Presiding Officer in the Harwood letter, that is with the Region offering on direct the transcribed testimony of its witnesses from the 1984 hearing, then tendering the witnesses for cross-examination by Respondents.

After listening to a good deal of argument between counsel, the Presiding Officer ruled that the procedure established in his September 1993 letter would be followed. He granted Respondents the right to conduct "wide open" cross-examination of the Region's witnesses (1994 Transcript ("1994 Tr.") at 4, 6), and assured Respondents that he would review the entire record from the 1984 hearing *de novo* (i*d*. at 74).

The hearing then commenced. The Region called Ms. Becker to the witness stand. Under oath, she briefly reaffirmed the testimony she had given at the 1984 hearing. The Presiding Officer then invited Respondents to cross-examine Ms. Becker, having previously given them wide latitude as to the scope of their examination. *Id*. at 4, 6. Respondents, however, refused to cross-examine Ms. Becker on the ground that the Region had not presented any evidence, and therefore they were not obligated to present any defense. The Region then offered into evidence the written record of Ms. Becker's 1984 testimony. *Id*. at 23-24.

Dr. Homer was not scheduled to appear until the second day of the hearing. Consistent with its pre-hearing

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[20](...continued)
defense.

exchange and with the established hearing format, the Region explained that it intended to call Dr. Homer to the witness stand solely to reaffirm his 1984 testimony. In response, Respondents stated that if the Region proceeded in that fashion, they would not cross-examine Dr. Homer, contending as they had with Ms. Becker, that any such "reaffirmance" would not constitute "evidence" and that they therefore had no obligation to engage in cross-examination. Based on Respondents' statement that they did not intend to cross-examine Dr. Homer, the Presiding Officer permitted the Region to cancel Dr. Homer's appearance. The Region then offered into evidence the written record of Dr. Homer's 1984 testimony. 1994 Tr. at 52.

Again following the trial strategy revealed in its pre-hearing exchanges, the Region intended to call Mr. Shillman as its final witness for the sole purpose of reaffirming his 1984 testimony. Although Respondents had stated in their pre-hearing submissions that they would call Mr. Shillman as a witness *in their behalf*, they refused to make him available to the Region, claiming, for the third time, that since the Region had not put on any evidence they were not obligated to present any defense, which included making any of their witnesses available to the Region. 1994 Tr. at 56. The Region then offered into evidence the written record of Mr. Shillman's 1984 testimony, and rested its case. 1994 Tr. at 59, 68.

Respondents made an oral motion to dismiss which the Presiding Officer initially denied but later agreed to take under advisement. *Id*. at 68, 73, 84. Respondents then rested their case stating through their counsel: "[R]espondents, in light of the facts, * * * believe the Government has not made out even a *prima facie* case, [and] are not prepared to offer any evidence." *Id*. at 82.

Throughout the hearing, the Presiding Officer reiterated that he would consider the entire record of the

1984 proceedings, (including the documents marked as exhibits), and that Respondents were free to contest the propriety of that decision, among other issues, in their post-hearing briefs. 1994 Tr. at 47, 64, 77.

F. *Initial Decision following 1994 Hearing*

In July 1995, after the parties had exchanged and filed their post-hearing briefs, the Presiding Officer issued his initial decision in which he found the Partnership, Mr. Shillman and Ms. Brueggemeyer jointly and severally liable for the violations alleged and assessed a civil penalty against all Respondents of $23,500. *In re J.V. Peters and Company, Inc.*, Docket No. V-W-81-R-75 (ALJ, July 18, 1995) ("Initial Decision").[21]

First, the Presiding Officer cogently summarized the core disputed issues:

> The question initially presented * * * is whether Respondents, having been given the opportunity to cross-examine Complainant's witnesses on their sworn testimony at the prior hearing and to present evidence on their own behalf, will be deprived of a fair hearing if the evidence adduced at that prior hearing is made part of the record of this hearing and relied upon to determine Respondents' liability for a penalty. If Respondents prevail on this issue, the complaint must be dismissed. If Respondents do not prevail, it must then be determined whether the reliable and probative

[21]In their post-hearing brief Respondents had once again raised their statute of limitations arguments, requesting that the Presiding Officer reconsider his ruling rejecting this defense. The Presiding Officer stood by his original ruling on the issue, citing the reasons stated in his previous order. Initial Decision at 9 n.20.

evidence of record, giving consideration to the record as a whole, supports a finding that the violations have occurred and that

> Respondents are liable for the penalty of $25,000, proposed in the complaint or for some lesser penalty.

Initial Decision at 8-9.

Analyzing the due process issues as a whole, the Presiding Officer noted that Respondents had been given an opportunity to cross-examine the Region's witnesses and to present evidence in their defense, but had declined to do either. The Presiding Officer was therefore satisfied that Respondents had been afforded all that was required by due process and by the District Court's order. In the Presiding Officer's view, Respondents' failure to take advantage of these opportunities simply did not rise to the level of a due process violation: "Having declined to take advantage of any of these opportunities, [Respondents'] arguments as to asserted deficiencies in the 1984 record are unpersuasive." Initial Decision at 12.

The Presiding Officer then considered and responded separately to each of Respondents' due process contentions. He found Respondents' complaint that they had no opportunity to object to the evidence in the 1984 record unpersuasive because Respondents failed to specify either the objections they would have made or the grounds for making them. *Id*. He found Respondents' argument that they were "deprived" of the opportunity to have him assess the credibility of witnesses similarly unpersuasive, noting that he would have had sufficient opportunity to make such an assessment on cross-examination had Respondents conducted one. *Id*. at 12-13. He found Respondents' argument that the 1984 record was inadmissible hearsay also without merit, since hearsay rules do not apply in administrative proceedings, and the evidence was reliable

and probative and thus admissible under 40 C.F.R. § 22.22(a). *Id*. at 13-14.[22]

Having determined that the record from the 1984 proceedings was properly admitted and relied upon, the Presiding Officer then moved on to consider whether there was sufficient evidence to hold Respondents liable for the alleged violations. Considering the eighteen violations alleged in the complaint, the Presiding Officer found that all but one had occurred.[23] Then, considering the specific liability of each Respondent, the Presiding Officer found that Mr. Shillman was individually liable based upon his role as the operator of the facility, the Partnership was liable as the owner of the facility on the date of the alleged violations, and Ms. Brueggemeyer was liable based on her status as a partner in the Partnership on the date of the alleged violations. *Id*. at 21-23.

Finally, the Presiding Officer evaluated the penalty and reduced it by $1500 to account for his dismissal of the

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[22]In particular, with respect to Mr. Shillman's testimony in 1984, the Presiding Officer rejected Respondents' argument that such evidence was not admissible because the strategy pursued by the Corporation in 1984 was different from that which would have been pursued if Respondents were parties at that time, stating that Respondents "were given the opportunity either by recalling Mr. Shillman, or by other evidence to correct whatever inaccuracies there may have been in his testimony or to fill in any gaps that were not thought to be important at that time. Again Respondents chose not to avail themselves of this opportunity." Initial Decision at 14-15.

[23]Finding the evidence on closure requirements and procedures inconclu-sive, the Presiding Officer dismissed the portion of the complaint alleging that Respondents failed to follow the applicable closure process. Initial Decision at 20-21.

closure procedure violation.[24] Accordingly, the Presiding Officer assessed a $23,500 penalty jointly and severally against the Partnership, Mr. Shillman and Ms. Brueggemeyer. *Id*. at 23-25.

Respondents appealed the Initial Decision to this Board, necessitating our review of the issues previously outlined.

II. *DISCUSSION*

We begin with an analysis of Respondents' statute of limitations argument, because if they succeed on this issue, we need not consider their remaining arguments.

A. *Statute of Limitations*

Respondents' contention that the complaint is barred by the five-year statute of limitations set forth in 28 U.S.C. § 2462 (Resp. Br. at 1, 30-44) has been rejected by every judge who has considered the issue in these proceedings.[25] The

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[24]The Region did not appeal this reduction in the penalty. We note, however, that the Region argues in its reply brief that a larger penalty should be awarded. Complainant's Reply Brief ("Cmpln. Br.") at 4 n.3. We will not consider this argument since the Region has not appealed the amount of the penalty. *See In re Ashland Oil, Inc., Floreffe, PA*, 4 E.A.D. 235, 238 (EAB 1992) (Region's failure to appeal penalty amount precludes consideration of arguments in reply brief urging increase in penalty); and *In re ALM Corporation*, 3 E.A.D. 688, 694 n.12 (CJO 1991) (same).

[25]*See In re J.V. Peters and Company*, Dkt. No. V-W-81-R-75, slip op. at 9-10 (ALJ, Sept. 26, 1988) (initial decision by Judge Marvin Jones granting Region's motion for accelerated decision); *In re J.V. Peters & Co., Inc.*, 3 E.A.D. 280, 284-290 (CJO 1990) (Chief Judicial Officer Ronald McCallum's final decision affirming Judge Jones' initial decision); *J.V. Peters v. Reilly*, slip op. at 12-13 (U.S. District Judge Manos' affirmance of CJO McCallum's decision on the statute of limitations issue); Order (Sept. (continued...)

most significant of these rejections is U.S. District Judge Manos' ruling that the complaint *is not* time-barred. *J.V. Peters v. Reilly*, slip op. at 12-13. That ruling is the law of the case, and thus precludes further review of the issue by this Board.

The doctrine of law of the case prevents relitigation of settled rulings. *See generally* James W. Moore, Moore's Federal Practice ¶¶ 404[1] & 404[10](2d ed. 1991) ("Moore's Fed. Prac."). Under the doctrine, "a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *Id.* ¶ 404[1]; *Central Soya, Inc. v. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983).[26] As a consequence, an inferior court has no power to deviate from a reviewing court's ruling on an issue of law; the ruling becomes mandatory precedent which the lower court is obligated to follow. Moore's Fed. Prac. ¶ 404[10]; *see also, Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948) (stating general rule). The doctrine applies with equal force in administrative agency adjudications.[27]

Thus, the Presiding Officer correctly followed the ruling of the District Court in rejecting Respondents' statute

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[25](...continued)
26, 1994) (ALJ Harwood's denial of Respondents' motion to dismiss and for accelerated decision); and Initial Decision at 9 n.20 (Judge Harwood's refusal to reconsider his ruling rejecting Respondents' statute of limitations defense).

[26]*See also In re Bethenergy (Bethlehem Steel Corporation)*, 3 E.A.D. 802, 805 n.5 (CJO 1992) (citing and quoting Moore's Fed. Prac. for general rule).

[27]*See, e.g., In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988) ("[T]he rule is equally applicable to the duty of an administrative agency * * * to comply with the mandate issued by a reviewing court * * *.").

of limitations defense. Consequently, we affirm his refusal to dismiss the complaint.

B. *Evidence from 1984 Hearing*

Respondents advance a three-pronged attack on the Presiding Officer's decision to permit the Region to utilize evidence from the 1984 hearing to establish its *prima facie* case at the hearing in 1994. Respondents contend that utilization of that evidence was inconsistent with the Remand Order, violated due process, and was improper because the evidence was inadmissible against them. Resp. Br. at 19-30.

1. *Consistency with Remand Order*

We first consider Respondents' argument that permitting the Region to establish its *prima facie* case utilizing evidence from the prior hearing was inconsistent with the Remand Order. In further explaining this point, Respondents contend, "it is reasonable to assume that * * * Judge Manos' finding that the CJO [erred] by affirming an accelerated decision on the basis of the 1984 record * * * require[d] a new hearing at which [Respondents] could hear the evidence * * * against them, and then exercise their 'opportunity to present evidence in their own defense' * * *." Resp. Br. at 20.

While the text of the Remand Order (*see* Section I.C., *supra*) is ambiguous in this respect, we will assume for purposes of our analysis that Respondents are correct that the District Court's order requires a new hearing, not a continuation of the old one. Even under this assumption, however, we find no language in the Remand Order which prohibits the Presiding Officer from structuring the hearing as he did, that is, allowing the Region to establish its *prima facie* case anew utilizing evidence from the 1984 hearing. Further, contrary to Respondents' claims, the Presiding Officer *did* hold a new hearing, because he agreed to consider

the evidence from the 1984 hearing *de novo* (1994 Tr. at 74), he gave Respondents the opportunity to cross-examine the Region's witnesses on topics not covered at the previous hearing (*id*. at 4, 6), and he also gave Respondents wide latitude to present new evidence in their defense (*id*. at 13).[29] Since Respondents were in fact granted a "new" hearing, we reject their contention that the structure or format of the 1994 hearing was inconsistent with the Remand Order.

2. *Due Process*

Respondents contend that permitting the Region to utilize evidence from the 1984 hearing against them in 1994 violated due process. Resp. Br. at 2, 20-30. Although they fail to fully explain this contention,[30] it is clear that Respondents' claims that they were denied due process lie at the heart of this appeal. *See id*. Consequently, we address this contention separately, rather than as a component of Respondents' other two arguments attacking the use of evidence from the 1984 hearing.

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[29]On this last point, the Presiding Officer assured Respondents' attorney, "[Y]ou'll be free to present whatever case you want with respect to [Respondents]." *Id*. at 13.

[30]Respondents' due process claims are subsumed within their arguments criticizing the Presiding Officer's utilization of evidence from the 1984 hearing on the basis of its alleged inconsistency with the Remand Order and its alleged inadmissibility against Respondents. For example, Respondents mention that "Judge Manos certainly did not hold that * * * due process merely required EPA to give the non-parties an opportunity to present evidence in their defense in response to the 'record' developed against a non-party 9 years ago." (Resp. Br. at 20), but do not further develop their due process claim in that discussion. Similarly, Respondents claim in an argument heading that: "The Procedure Sanctioned by [the Presiding Officer] * * * Deprived [Respondents] of Due Process of Law" (Resp. Br. at 21-30), but instead of discussing their due process claims, they focus on why the 1984 evidence was improperly admitted against Respondents.

Due process requires that a person be given adequate notice and an opportunity to be heard in any proceeding where he or she may be deprived of life, liberty or property. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 313-314 (1950). *See also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" [citing *Mullane*]) and *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'").[31] Applying these standards to the case under review, we find no violation of due process.

At the root of Respondents' vague claim that they were denied due process is an attack on the format of the hearing utilized by the Presiding Officer. *See* Resp. Br. at 21 (alleging that "the procedure sanctioned by ALJ Harwood * * * deprived [Respondents] of due process * * *."). However, we find no error in the Presiding Officer's decision to hold the hearing according to the format outlined in the Harwood letter. *See* discussion *supra* Section I.D.

Presiding officers have wide discretion to control the order and format of administrative hearings. *See, e.g., In re Central Paint and Body Shop, Inc.*, 2 E.A.D. 309, 310 (CJO 1987) ("The Presiding Officer has broad authority to control the hearing * * *[citing 40 C.F.R. § 22.04(c)]") and *In re Alaska Placer Miners*, 3 E.A.D. 748, 752 (CJO 1991) ("The

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[31] *See also In Re General Electric Company*, 4 E.A.D. 615, 627 (EAB 1993) ("[T]he due process clause guarantees that before a deprivation of property occurs, [a] person * * * must be given notice of the * * * deprivation and an opportunity for a hearing * * *.") and *In Re Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, slip op. at 13 (EAB March 6, 1997), 6 E.A.D.___ (acknowledging respondent's constitutional right to *opportunity* to be heard before imposition of civil penalty).

presiding officer has discretion to take appropriate actions to ensure the orderly administration of an evidentiary hearing."). In this vein, the Consolidated Rules of Practice ("Consolidated Rules") expressly provide:

> The Presiding Officer shall have authority to:
>
> *Do all * * * acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.*

40 C.F.R. § 22.04(c)(10) (emphasis added).

With respect to witness testimony, the Consolidated Rules plainly authorize the use of written statements in lieu of live testimony. *See id.* at §§ 22.22(c) & (d). Further, the Presiding Officer has explicit authority to allow other than oral testimony even when the rules do not expressly provide for it. Specifically, Section 22.22(b) provides: "Witnesses shall be examined orally, under oath or affirmation, *except as otherwise provided* in these rules of practice or *by the Presiding Officer*." (Emphasis added). In this respect, the Consolidated Rules allow procedures similar to those used in other administrative adjudications that have withstood due process challenges. *See, e.g., Bennett v. National Transportation Safety Board*, 66 F.3d 1130, 1137 (10th Cir. 1995) (use of affidavits without opportunity for cross-examination did not violate due process in Federal Aviation Administration ("FAA") suspension hearing, where appellant was given notice of the procedure and failed to object or subpoena witnesses) and *In re Adair*, 965 F.2d 777 (9th Cir. 1992) (in bankruptcy proceeding direct testimony by way of written declarations did not violate due process where re-direct and cross-examination of declarant was permitted and the trier of fact was able to observe declarant's demeanor). Clearly, the practice of using written testimony to establish

at least portions of a direct case is accepted in administrative proceedings and comports with due process.[32]

Here, Respondents had over one year's notice of the hearing and of the format which would be followed at that hearing. The Region's witnesses had both testified at the prior hearing in person, under oath and subject to extensive cross-examination. Respondents had the transcript of the prior proceeding, and in addition, transcript page citations provided by the Region which specifically identified the testimony the Region planned to introduce at the hearing in 1994. Finally, Respondents at the 1994 hearing had the opportunity to conduct "wide open" cross-examination of the Region's witnesses. 1994 Tr. at 4, 6.

Given these circumstances, we conclude that Respondents were afforded adequate notice and a fair opportunity to "be heard" before the civil penalty was imposed against them. This is all the "process" they were due, under either the literal terms of the Remand Order or under the more general concepts of notice and fairness embodied in *Mathews v. Eldridge*.

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[32]Further, the Supreme Court has recognized that due process *does not* require a full-blown adversary hearing with oral presentation of evidence by both sides in every case. *See, e.g., Mathews v. Eldridge*, 424 U.S. at 334, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]"ue process is flexible and calls for such procedural protections as the particular situation demands."). Consistent with this notion, this Board has held that "hearings" comprised *solely* of documentary submissions are perfectly in keeping with the requirements of due process, given the highly-technical arena in which these environmental enforcement and compliance cases arise. *See In re General Electric*, 4 E.A.D. at 627, 639 (in the context of RCRA permit modification process documentary "hearings" are sufficient since "corrective action determinations turn on technical data which is amenable to effective written presentation"); and *In re Green Thumb Nursery, Inc.*, slip op. at 10 n.14 (recognizing that under certain circumstances disposition of a matter on motion papers alone constitutes a "hearing" which satisfies due process).

The result in *Bennett*, 66 F.3d at 1137, fortifies our conclusion. There, the FAA suspended Bennett's airline transport pilot certificate after he engaged in flight maneuvers which caused a near collision with another aircraft. At the suspension hearing, the FAA introduced sworn statements from the couple in the other aircraft who had witnessed the flight maneuvers. Bennett appealed the suspension on the grounds, *inter alia*, that he had been denied due process since he had been deprived of the opportunity to cross-examine the couple. In rejecting Bennett's due process claim, the Court of Appeals for the Tenth Circuit stated:

> But while Fifth Amendment protection extends to agency adjudications * * * that does not help Bennett. * * *. Bennett had been notified during the week preceding the Hearing that the O'Malleys would not be able to attend due to their vacation plans * * *, and that FAA would seek to have the O'Malleys' "testimony, at least in the form of a declaration" available at the hearing * * *. Nevertheless, Bennett failed to subpoena the O'Malleys, as was his right under Board's Rules of Practice * * *. Nor did he seek to depose the O'Malleys * * * or request a continuance either before the Hearing or afterwards. Thus having

> foregone the available opportunities for cross-examination, he cannot ascribe error on that ground.

Bennett at 1137 (citations omitted).

Bennett makes it plain that Respondents have stated no cognizable due process claims in this case. As opposed to the one week's notice given to Mr. Bennett, Respondents in this case had *over one year's notice* that the Region would offer the prior testimony of its witnesses on direct and then tender the witnesses for cross-examination. What is more, *nearly nine months before the hearing* Respondents were given the specific transcript page citations for all of the testimony to be introduced by the Region at the hearing, thus giving them ample time and resources to prepare for cross-examination. And unlike in *Bennett* where the adverse witnesses were not present at the hearing, the Region in this case made its witnesses available *in person* for cross-examination. Despite being afforded these generous opportunities, Respondents refused to conduct *any* cross-examination or present *any* defense. Their refusal to take advantage of these opportunities cannot be assigned as error on the part of the Presiding Officer. In the words of the Court of Appeals for the Tenth Circuit, "having foregone the available opportunities for cross-examination, [Respondents] cannot ascribe error on that ground." *Id.* We therefore hold that the Presiding Officer's decision to permit the Region to rely on testimony and evidence from the 1984 hearing to establish its *entire* direct case at the 1994 hearing was an exercise of sound discretion and comported with the requirements of due process.[33]

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[33]We note that the Region's *prima facie* case was comprised of testimony from the 1984 hearing, documents marked as exhibits at that hearing, and also Respondents' answers to the Second Amended

(continued...)

3. *Admissibility of Evidence from 1984 Hearing*

We now turn to Respondents' assertion that the evidence from the 1984 hearing is inadmissible as to them. This assertion appears to rest on six contentions which purport to illustrate that the admission of testimony from the 1984 hearing was improper. *See* Resp. Br. at 21-22.[34] We will first demonstrate why Respondents' general assertion that the evidence is inadmissible must be rejected. We will then respond separately to each of Respondents' six related contentions.

The mere fact that Respondents were not parties at the time of the 1984 hearing does not preclude evidence from that proceeding from being introduced against them at the hearing in 1994. The controlling inquiry in determining whether particular evidence is admissible is whether the evidence is relevant, probative and reliable. *See* 40 C.F.R. § 22.22(a) ("The presiding officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious or

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[33](...continued)
Complaint and their pre-hearing submissions. *See* Preliminary List of Excerpts of the Administrative Record Relied on By Complainant on Remand, p.2, attached to Krueger letter. Since Respondents' due process challenge does not specifically address any of the documentary evidence, we need not analyze that evidence separately. However, our decision on the due process issue covers the testimony as well as the documents which were introduced from the 1984 hearing.

[34]It is unclear whether these six contentions are offered in support of Respondents' due process claims or are intended to support their claims that the evidence was inadmissible, since Respondents' brief uses these concepts interchangeably. *See* Resp. Br. at 21; *see also* discussion *supra* n.30. We assume that the contentions are part of Respondents' claims that evidence from the 1984 hearing was inadmissible against them and address each contention separately *infra* at Sections II.B.3.a - II.B.3.f. To the extent the contentions are intended to support Respondents' claims of due process, we refer to our earlier discussion demonstrating that Respondents' due process claims lack merit.

otherwise unreliable * * *."). A presiding officer has broad discretion in determining what evidence is properly admissible and his rulings on such matters are entitled to substantial deference. *See, e.g., In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge because he is hearing the case first-hand and therefore, his rulings are entitled to considerable deference.").[35]

The evidence offered by the Region to establish its case, comprised in large part of the 1984 testimony of Ms. Becker, Dr. Homer and Mr. Shillman, was probative, relevant and reliable, and thus properly admitted against Respondents.

Ms. Becker's testimony in 1984 covered the conditions she observed during her inspection of Respondents' facility and her conversations with its operator, Mr. Shillman. These observations formed the basis for the RCRA violations alleged in the Region's complaint, and are therefore central to the liability of any party charged with those violations. As such, the relevance and probative value of Ms. Becker's 1984 testimony is readily apparent. The testimony was reliable as it was taken under oath and Ms. Becker was subjected to lengthy and thorough cross-examination.[36] In light of these facts Ms. Becker's prior testimony was properly admitted against Respondents.

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[35] *See also, In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 369 (EAB 1994) (citing and quoting from *Sandoz*); *In re Celotex Corp.*, 3 E.A.D. 740, 743 (CJO 1991) (quoting 40 C.F.R. § 22.22(a) and *Sandoz*); and *In re Rocky Mountain Prestress, Inc.*, 2 E.A.D. 4, 8 (CJO 1985) (noting presiding officer's broad discretion to admit evidence).

[36] We address *infra* at Section II.B.3.c, Respondents' arguments that counsel's cross-examination of Ms. Becker and Dr. Homer in 1984 was somehow inadequate for their defense strategy in *1994*.

Dr. Homer's 1984 testimony described the method and manner in which he calculated the penalty for the violations set forth in the Region's complaint. Although these calculations were not adjusted to account for the conduct of any of the Respondents as individuals, Dr. Homer's testimony was still relevant as evidence of the appropriate penalty for the violations alleged in the Second Amended Complaint.[37] The testimony was thus clearly relevant and admissible, as would have been any rebuttal evidence showing that the penalty should be reduced against an individual Respondent due to his, her, or its good faith conduct.[38] Dr. Homer's testimony was also reliable, as it too was given in court,

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[37]The penalty was calculated based on violations committed by "the facility," not by any of the individual Respondents. 1984 Tr. at 345-346. For each violation or group of violations Dr. Homer calculated the penalty as follows: he first determined the appropriate class for the violation, then rated as either minor, moderate or major the damage or potential damage caused by such violation. He next rated as either minor, moderate or major the conduct of the facility. Finally, using the matrix system described in the policy, he affixed a penalty amount for the specific violation or group of violations. *Id*. at 345. Dr. Homer made no adjustments to the penalty for mitigating or aggravating conduct, as he believed that the mitigating factor that the facility had not been in operation since 1981, and the aggravating factor that the facility had not complied with the regulations while it was operating, balanced each other out. *Id*. at 346.

[38]*See* 1980 RCRA Penalty Policy at 5-6, 14-18 (recognizing that penalty calculations must take into account the conduct of the particular individual or entity upon whom penalty will be imposed so as to determine whether modifications in the dollar value of the proposed penalty are warranted). We note that the Presiding Officer was free to give the testimony of Dr. Homer and any other evidence, including that which *might* have been offered (but was not) to show that the penalty should be reduced, as much or as little weight as he deemed appropriate in determining a penalty. *See* 40 C.F.R. § 22.27(b) (presiding officer must consider, but is not bound by, any applicable civil penalty guidelines).

under oath and subject to lengthy and thorough cross-examination.[39]

Finally, the prior testimony of Mr. Shillman is unquestionably admissible against Respondents. This testimony -- covering in substantial detail the operations of the facility, Shillman's role as the facility's operator, the relationship between the Partnership and the Corporation, and an explanation of Ms. Brueggemeyer's role in each entity -- bears directly upon the liability of each Respondent for the violations alleged in the complaint. The testimony was given under oath and subject to cross-examination and therefore is inherently reliable.

Further, Mr. Shillman's testimony was inculpating to a great degree: he not only admitted that the facility was in

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[39]Respondents claim that the Presiding Officer erroneously treated the prior testimony of Ms. Becker and Dr. Homer as "verified statements" under 40 C.F.R. § 22.22(c). *See* Resp. Br.at 22-23 & n. 21.

> Section 22.22(c) provides in pertinent part:
>
> > The Presiding Officer may admit * * * into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination * * *. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

According to Respondents, Ms. Becker's and Dr. Homer's prior testimony should not have been admitted as verified statements because neither witness prepared the testimony or properly verified it. Resp. Br. at 23. As we have demonstrated, the testimony of both Ms. Becker and Dr. Homer was properly admitted under Sections 22.22(a) & (b). In light of this, we find it unnecessary to determine whether the testimony of either witness is technically a "verified statement" under Section 22.22(c).

violation of certain statutory requirements, but he also identified the other Respondents as responsible parties.[40] These highly probative and reliable "party admissions" are certainly admissible against all Respondents.[41]

We now address Respondents' individual contentions.

a. *Opportunity to "hear the evidence"*

Respondents claim they had "no opportunity to hear the evidence and meaningfully engage in cross-examination." Resp. Br. at 22-24. More particularly, Respondents assert:

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[40] *See, e.g.*, 1984 Tr. at 482, 497, 588-590 (admitting knowledge that the facility was in violation of certain RCRA requirements). *See also id.* at 432-433, 436; 549-551 (explaining Shillman's purpose and intent in forming the Partnership, and his and Ms. Brueggemeyer's roles therein).

[41] Although the Federal Rules of Evidence are not applicable in administra-tive hearings under the Consolidated Rules, (*see In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994)), and hearsay rules do not apply, we note that Mr. Shillman's statements are admissions which have great probative value under those rules. Specifically, Rule 801(d)(2)(A)provides:

> A statement is not hearsay if:
>
> **Admission by Party-Opponent**. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

> These [Respondents] were entitled to hear the evidence against them from the mouths of witnesses competent to testify before they could, or had any obligations to "set the record straight."

Id. at 22. We know of no authority requiring such needless repetition of prior testimony. To the contrary, the Consolidated Rules *exclude* evidence which is "unduly repetitious." 40 C.F.R. § 22.22(a). The Consolidated Rules also expressly permit the use of sworn statements in lieu of live testimony. *Id*. at §§ 22.22(c) & (d). Moreover, as we have noted throughout this discussion, Respondents were given ample time to prepare their defense and ample opportunities to cross-examine the Region's witnesses, or to call their own witnesses to the stand. Their complaints are therefore without merit.

b. *Opportunity to Object*

Respondents claim that because they were not present at the 1984 hearing to interpose objections to the testimony taken at that time, that testimony should be excluded. Resp. Br. at 24-25. The Presiding Officer correctly identified the flaw in this argument: Respondents fail to identify a single objection they might have made that was not made by the Corporation. Initial Decision at 12. Further compounding this glaring deficiency, Respondents do not show that they were prohibited from making the necessary objections to that evidence at the hearing in *1994*. In fact, Respondents can scarcely make such a claim, since the Presiding Officer *expressly invited* them to state whatever objections they had to introduction of the prior testimony. 1994 Tr. at 64, 77. That invitation was certainly broad enough to encompass evidentiary objections. However, Respondents did not take advantage of this opportunity, either at the hearing or in their post-hearing brief.

Simply put, Respondents have failed to demonstrate how they were prejudiced, especially since they were given wide latitude at the 1994 hearing to cross-examine witnesses and put on a full-fledged defense. Therefore, the alleged inability to make unspecified objections to unspecified prior testimony simply is not a deprivation of due process.

c. *Prior Cross-Examination*

Respondents claim: "The prior cross-examination reflected the corporation's trial strategy without consideration of the defenses that these [Respondents] have." Resp Br. at 25. Respondents utterly fail to identify in what way the lengthy and thorough cross-examination of the Region's witnesses at the prior hearing somehow did not serve their needs in 1994. In the absence of such specifics, it is difficult to assess what harm, if any, they have suffered.

Even assuming, however, that the prior cross-examination somehow fell short of their needs, *Respondents had an opportunity to rectify that shortcoming by cross-examining those same witnesses at the hearing in 1994, yet deliberately forewent this opportunity*. In attempting to justify their inaction, Respondents complain that this opportunity was merely "an invitation to rebut stale evidence" and that they were placed in the "untenable position" of having to "explain" evidence or fill in gaps. Resp. Br. at 27. We find these assertions unpersuasive. Rebutting evidence, filling in gaps and explaining away adverse evidence are the essence of preparing a defense in *any* case. And Respondents here had far greater advantages in preparing their defense than the ordinary defendant preparing for trial. The Region completely bared its trial strategy to Respondents over one year before the hearing, then practically drew them a road map of the evidence it would use at trial, complete with transcript page citations to the evidence. At the hearing itself Respondents were *invited* to conduct "wide open,"

virtually unlimited cross-examination of the adverse witnesses.

In sum, Respondents had the Region's case laid out for them well in advance and were given a liberal opportunity to deploy every weapon in their defensive arsenal to attack and defeat that case. They were in no way limited to or by the prior cross-examination. Thus, Respondents' vague claim that the prior cross-examination was somehow insufficient is wholly without merit.

d. *Hearsay*

Respondents claim: "The 'record' developed at a time when the [Respondents] were not parties was, as to the [Respondents], inadmissible hearsay." Resp. Br. at 21, 27-28.[42] This hearsay claim is unfounded. As the Presiding Officer correctly pointed out (Initial Decision at 13), the hearsay rule is not followed in administrative proceedings. *In re Great Lakes*, 5 E.A.D. at 368.

Moreover, as demonstrated earlier, the evidence from the prior hearing which was introduced by the Region was probative, relevant and reliable, and, for these reasons, properly admitted by the Presiding Officer under 40 C.F.R. § 22.22(a).

e. *The Region Did Not Make A Prima Facie Case*

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[42]Respondents do not further develop this hearsay argument. Instead they acknowledge that the assertion quoted in the text was rejected by the Presiding Officer, then move on to discuss the alleged absence of a meaningful opportunity to confront the Region's witnesses and the Region's alleged failure to make a *prima facie* case. *See* Resp. Br. at 27-28. We address these latter contentions *supra* at Section II.B.3.a and *infra* at Section II.B.3.e, respectively.

Respondents claim that "The evidence adduced at the hearing in 1984 did not relate in any manner to the [Respondents]. As such, that evidence was insufficient as a matter of law to make out the *prima facie* case that EPA was required by law to prove." Resp. Br. at 29. We wholly reject this statement and similar incarnations of it which appear throughout Respondents' brief. *See id.* at 18-19, 22, 28-29. As a general matter, it is the substance, not the form, of evidence which determines whether a *prima facie* case has been made. *See* 40 C.F.R. § 22.24 (*prima facie* case is established by proving violations alleged). Here, the violations alleged in the complaint were supported by the 1984 testimony of Ms. Becker, Dr. Homer and Mr. Shillman. This prior testimony, permissibly introduced at the 1994 hearing in transcribed form, was highly probative of Respondents' liability and also inherently reliable, as it was given under oath and subject to cross-examination. *See* discussion *supra* Section II.B.3. Thus, concrete evidence establishing Respondents' liability was *in fact* admitted at the 1994 hearing, and the burden had shifted to Respondents to rebut or disprove that evidence, which they failed to do.

f. *Assessment of Witnesses*

Respondents' final complaint is that they were "deprived of the *right*[43] to have a neutral presiding officer hear

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[43]There is no "right" to have a presiding officer hear testimony; the presiding officer is qualified to render a decision so long as he or she has reviewed the testimony and given it appropriate weight. *See, e.g., Guerrero v. New Jersey*, 643 F.2d 148, 149 (3d Cir. 1981) ("It has been settled since *Morgan v. U.S.* * * * that in administrative adjudications, deciding officers need not actually hear the witnesses' testimony * * * [so long as] the decision is based solely on a considered review of the evidence and legal arguments."); *NLRB v. Stocker*, 185 F.2d 451, 452-453 (3d cir. 1950) (due process proceedings before NLRB do not require that testimony be evaluated by officer who heard and observed witnesses); and *Morgan v.* (continued...)

the evidence against them, observe the demeanor of the witnesses, hear the cross-examination and assess the witness' credibility and the extent to which they lacked credibility due to interest, bias or corruption." Resp. Br. at 22 (emphasis added).

As we have repeatedly demonstrated throughout this discussion, Respondents were certainly given the *opportunity* to have the Presiding Officer hear witness testimony. They were invited to conduct liberal, wide-ranging, cross-examination of the Region's witnesses (1994 Tr. at 4, 6), and it is during cross-examination that the credibility of witnesses can be most seriously tested. They were also permitted to introduce whatever evidence they desired in their own defense. *Id*. at 13. This evidence could have consisted of testimony from any witness Respondents desired to call in their behalf, including, if Respondents had so desired, a brand new direct examination of their chief witness, Mr. Shillman.[44] Respondents forwent *all* of these opportunities. Since the error they claim resulted from Respondents' deliberate inaction and not from any arbitrary or capricious decision by the Presiding Officer, Respondents' contentions are devoid of merit.

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[43](...continued)
U.S., 298 U.S. 468, 481 (1936) (establishing general rule that deciding body need not hear but must evaluate testimony).

Here, the Presiding Officer repeatedly stated that he would review the entire record, including *all* of the testimony from the 1984 hearing. 1994 Tr. at 64, 74, 77, 82. We do not doubt that he did so.

[44]Respondents imply that the prior testimony of Mr. Shillman was impro-perly admitted against them because the Corporation pursued a different trial strategy in 1984 than that pursued by Respondents in 1994. Resp. Br. at 25-26. As the Presiding Officer correctly pointed out, Respondents could have cured this alleged problem by conducting a fresh examination of Mr. Shillman. *See* discussion *supra* n.22.

C. *Penalty*

The only remaining issue is whether Respondents are liable for the penalty assessed against them. We note that Respondents' appeal focuses exclusively on issues regarding the nature of the hearing and the statute of limitations, and fails to address the substance of the findings of liability and the amount of the penalty. As such, we need not consider these substantive issues.[45] We therefore affirm the Initial Decision both as to liability and penalty.

III. *CONCLUSION*

For the foregoing reasons, we affirm the Initial Decision and assess a penalty of $23,500 against Respondents jointly and severally. Respondents shall pay the full amount of the civil penalty within sixty (60) days of the date of service of this decision. Payment shall be made by forwarding a cashier's check, or certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA--Region V
Regional Hearing Clerk
United States Environmental Protection Agency
P.O. Box 70753
Chicago, IL 60673

So ordered.

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[45]In any event, it is clear that the Presiding Officer carefully evaluated the evidence offered in support of the proposed penalty, as is evidenced by his modest reduction in the penalty to account for dismissal of the closure procedure violation. *See* Initial Decision at 24.